

# Memorandum of Cooperation



**European Securities and Markets Authority (ESMA)**

# MAFF

**Ministry of Agriculture, Forestry and Fisheries**

**Ministry of Agriculture, Forestry and Fisheries (MAFF)**



***Ministry of Economy, Trade and Industry***

**Ministry of Economy, Trade and Industry (METI)**

## **Memorandum of Cooperation Related to CCPs established in Japan**

In view of a central counterparty (“CCP”) established in Japan and licensed or approved by the Ministry of Agriculture, Forestry and Fisheries (“MAFF”) and the Ministry of Economy, Trade and Industry (“METI”) having applied to the European Securities and Markets Authority (“ESMA”) for recognition as a CCP, pursuant to Article 25 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”) (“Covered CCP”), ESMA and MAFF and METI have reached this Memorandum of Cooperation (“MoC”) regarding Covered CCPs.

Under Article 25(6) of EMIR, the European Commission has adopted Commission Decision 2016/2275 determining that the legal and supervisory arrangements of Japan ensure that Covered CCPs comply with legally binding requirements which are equivalent to the requirements of EMIR, that Covered CCPs are subject to effective supervision and enforcement in Japan on an on-going basis, and that the legal framework of Japan provides for an effective equivalent system for the recognition of CCPs under the legal regimes of Japan.

Article 25(2)(c) of EMIR requires the establishment of cooperation arrangements as a precondition for ESMA to recognise CCPs established in Japan to provide clearing services to clearing members or trading venues established in the European Union.

Therefore, the purpose of this MoC is two-fold, namely to 1) confirm the fulfilment of the condition set out in Article 25(2)(c) of EMIR, *i.e.*, that cooperation arrangements have been established as regards the Covered CCPs; and 2) express the Authorities’ willingness to consult, cooperate and exchange information in the interest of fulfilling responsibilities and mandates of each Authority over the Covered CCPs.

This MoC is an arrangement among ESMA, MAFF and METI and not a collective arrangement with other European Union authorities. As such, it will not affect any arrangements which have been made, or may be signed, directly among other European Union authorities and MAFF and/or METI .

### **Item 1**

#### **Definitions**

For the purpose of this MoC:

- a) “Authority” means a participant to this MoC or any successor thereto;
- b) “Books and Records” means documents, electronic media, and books and records within the possession, custody and control of, and other information about, a Covered CCP;
- c) “CCP” means a central counterparty;
- d) “Covered CCP” means a CCP which is established in Japan and which has been licensed or approved as “commodity clearing organization” under the Commodity Derivatives Act 2009 (‘CDA’) and which has applied for recognition to ESMA pursuant to Article 25 of EMIR.

- e) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered CCP;
- f) "Governmental Entity" means, the authorities identified in Article 25(3) of EMIR, namely;
  - (a) the competent authority of a Member State in which the Covered CCP provides or intends to provide clearing services and which has been selected by the CCP;
  - (b) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States of the European Union which make or are anticipated by the CCP to make the largest contributions to the default fund of the CCP referred to in Article 42 of EMIR on an aggregate basis over a one-year period;
  - (c) the competent authorities responsible for the supervision of trading venues located in the European Union, served or to be served by the CCP;
  - (d) the competent authorities supervising CCPs established in the European Union with which interoperability arrangements have been established;
  - (e) the relevant members of the European System of Central Banks ("ESCB") of the Member States in which the CCP provides or intends to provide clearing services and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;
  - (f) the central banks of issue of the most relevant European Union currencies of the financial instruments cleared or to be cleared.
- g) "Laws and Regulations" means, in relation to ESMA, applicable European Union legislation within ESMA's scope of action as set out in Article 1(2) of Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC and, in relation to MAFF and METI, any laws, regulations, and regulatory requirements relating and applicable to MAFF and METI in force in Japan;
- h) "On-site Visit" means any regulatory visit by ESMA to the premises of a Covered CCP located in Japan, including review of Books and Records;
- i) "Person" means a natural person, unincorporated association, partnership, trust investment company or corporation and may be a Covered CCP;
- j) "Recognition Conditions" means the recognition conditions set out in Article 25(2) of EMIR;
- k) "Requested Authority" means the Authority to whom a request is made under this MoC; and
- l) "Requesting Authority" means the Authority making a request under this MoC.

## Item 2

### General matters

1. Pursuant to the regime under EMIR for recognition of third-country CCPs, ESMA does not have direct supervision or enforcement powers over the Covered CCPs and relies on the supervision and enforcement capabilities of MAFF and METI, which supervises and enforces compliance with the relevant Laws and Regulations applicable to METI and MAFF.
2. This MoC does not cover cooperation with regards to CCPs established in the European Union because ESMA does not have direct supervisory powers in respect of such CCPs. For the avoidance of doubt, this MoC does not cover, in particular, cooperation in respect of CCPs established in the European Union of the supervisory college of which ESMA is a member.
3. This MoC is a statement of intent to consult, cooperate and exchange information in connection with the responsibilities and mandates of each Authority. The cooperation and information sharing arrangements under this MoC should be interpreted and implemented in a manner that is permitted by, and consistent with, the laws and other legal or regulatory requirements applicable to each Authority.
4. This MoC does not create any legally binding obligations, confer any rights or supersede any domestic laws. This MoC does not confer upon any Person the right or ability, directly or indirectly, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this MoC.
5. This MoC is not intended to limit or condition the discretion of an Authority in any way in the discharge of its regulatory responsibilities or to prejudice or affect in any way the individual responsibilities, competencies or autonomy of any Authority. This MoC does not limit an Authority to taking solely those measures described herein in fulfilment of its responsibilities and mandates. In particular, this MoC does not affect any right of any Authority to communicate with or obtain information or documents from any Person subject to its jurisdiction that is established in the other Authority.
6. Each Authority should, within the framework of this MoC, provide each other with the fullest cooperation permissible under the relevant Laws and Regulations applicable to each Authority. Following notification, cooperation may be denied:
  - a) Where the cooperation would require an Authority to act in a manner that would violate the relevant Laws and Regulations applicable to that Authority;
  - b) Where a request for assistance has not been made following the terms of this MoC; or

- c) On the grounds of European public interest for ESMA and of Japan's public interest for MAFF and/or METI.
7. Each Authority recognises that as of the date of this MoC no domestic laws or regulations applicable to each Authority should prevent it from providing assistance to one another, unless the request falls under any of the situation described in Item 2(6).
  8. To facilitate communication and cooperation under this MoC, the Authorities hereby designate contact persons the details of which are as set out in the Appendix. Any modifications to the details of contact persons should be communicated without undue delay to the other Authority.

### **Item 3**

#### **Scope of cooperation**

1. The Authorities recognise the importance of close communication concerning the Covered CCPs and intend to cooperate regarding:
  - a) general issues, including with respect to regulatory, supervisory or other developments concerning the Covered CCPs;
  - b) issues relevant to the operations, activities and services of the Covered CCPs; and
  - c) any other areas of mutual interest.
2. The Authorities recognise in particular the importance of close cooperation in the event that a Covered CCP, particularly one whose failure likely would be systemically important to an Authority, experiences, or is threatened by, a potential financial crisis or other Emergency Situation.
3. Cooperation will be most useful in circumstances where issues of regulatory concern may arise, including but not limited to:
  - a) the initial application of a Covered CCP for recognition in the European Union pursuant to Article 25 of EMIR;
  - b) changes in a Covered CCP's internal rules, policies and procedures that could affect the way in which the Covered CCP complies with any Recognition Conditions; or
  - c) regulatory or supervisory actions or approvals taken by ESMA or MAFF and/or METI in relation to a Covered CCP, including changes to the relevant obligations and requirements to which the Covered CCP is subject that may impact the Covered CCP's continued compliance with the Recognition Conditions.

4. *Notification.* The Authorities should seek to inform each other as soon as practicable of:
- a) any known material event that could adversely impact the financial or operational stability of a Covered CCP, including where the Covered CCP is deemed to be in breach of the conditions of any license, registration, authorisation or recognition, or of any Laws and Regulations to which it is subject;
  - b) enforcement or regulatory actions or sanctions, including the withdrawal, revocation, suspension or modification of any license, registration, authorisation or recognition concerning or related to a Covered CCP and which may have a material effect on the Covered CCP;
  - c) in respect of notification by ESMA to MAFF and METI , any permission or approval granted to a Covered CCP to provide clearing services to clearing members, trading venues or, when known to the CCP, clients established in the European Union, including in respect of branches of entities established in the European Union;
  - d) in respect of notification by ESMA to MAFF and METI , any request to a Covered CCP to observe a measure that ESMA has adopted to ensure compliance with the Recognition Conditions, or to cease a practice that ESMA determines is contrary to the Recognition Conditions;
  - e) any material extension of the range of activities and services that a Covered CCP provides with respect to current or new asset classes or current or new European Union trading venues; and
  - f) material changes to the Laws and Regulations to which the Covered CCPs are subject.

The information to be provided by an Authority pursuant to this paragraph will be limited to the information referring to the Covered CCPs. The determination of what constitutes "material extension", "material changes", "material event", "adversely impact" or "material effect" will be left to the reasonable discretion of the Authority providing the information.

5. *Exchange of Written Information.* Each Authority, upon written request, intends to provide the other Authority with assistance in endeavouring to obtain information not otherwise available to the Requesting Authority and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with the relevant Laws and Regulations to which the Covered CCPs are subject, provided that the Requested Authority is authorised to collect such information. Such requests should be made pursuant to Item 4 of this MoC, and the Authorities anticipate that such requests will be made in a manner that is consistent with the goal of minimising administrative burdens.

The information covered by this paragraph includes without limitation:

- a) information that would assist the Requesting Authority in verifying that a Covered CCP complies with the relevant obligations and requirements of the relevant Laws and Regulations applicable to the Requesting Authority;

- b) information that would assist the Requesting Authority in verifying compliance with its request to a Covered CCP to observe a measure that it has adopted to ensure compliance with the relevant obligations and requirements of the relevant Laws and Regulations applicable to it or to cease a practice that it determines is contrary to them;
- c) information that would assist the Requesting Authority in recognizing changes to the relevant obligations and requirements to which the Covered CCPs are subject under the relevant Laws and Regulations applicable to the Requested Authority;
- d) information relevant to the financial and operational condition of a Covered CCP, which might include periodic reports submitted directly by a Covered CCP to an Authority;
- e) relevant regulatory information and filings that a Covered CCP is required to submit to an Authority; and
- f) regulatory reports and assessments, or findings or information contained therein, prepared by an Authority in respect of a Covered CCP.

The information to be provided by an Authority pursuant to this paragraph will be limited to the information referring to the Covered CCPs.

#### **Item 4**

##### **Execution of requests for information**

1. To the extent possible, a request for written information pursuant to Item 3(4) should be made in writing (which may be transmitted electronically) and addressed to the relevant contact person identified in Item 2(8). A request generally should state at least the following:
  - a) the information sought by the Requesting Authority;
  - b) a concise description of the matter that is the subject of the request and the purpose for which the information is sought, including the relevant Laws and Regulations applicable to the activity;
  - c) to whom, if anyone, including any Governmental Entity, onward disclosure of information is likely to be necessary and the reason for such disclosure; and
  - d) the desired time period for reply and, where appropriate, the urgency thereof.
2. In Emergency Situations, the Authorities should endeavour to notify each other of the Emergency Situation and communicate information between each other as deemed appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency

Situations, requests for information may be made in any form, including orally, provided that such communication is confirmed in writing as promptly as possible following such notification.

## **Item 5**

### **On-site Visits**

1. ESMA does not intend to conduct any On-site Visit of the Covered CCPs as part of its monitoring of the ongoing compliance by Covered CCPs with the Recognition Conditions, since under Article 25(6) of EMIR the European Commission has adopted Commission Decision 2016/2275 determining that the legal and supervisory arrangements of MAFF and METI ensure that Covered CCPs comply with legally binding requirements which are equivalent to the requirements of EMIR, that Covered CCPs are subject to effective supervision and enforcement in Japan on an ongoing basis, and that the legal framework of MAFF and METI provides for an effective equivalent system for the recognition of CCPs authorised under the legal regime of Japan.
2. Given that ESMA, in respect of Covered CCPs, relies on the supervision and enforcement capabilities of MAFF and METI , which supervise and enforce compliance with the relevant Laws and Regulations applicable to MAFF and METI , On-site Visits by ESMA officers will only be considered in exceptional circumstances and subject to the prior consent of MAFF and METI .
3. In such exceptional circumstances, the Authorities should discuss and reach a common recognition on the terms regarding an On-site Visit by ESMA officers, in particular in determining the respective roles and responsibilities of the Authorities. ESMA will act following the below procedure before conducting an On-site Visit:
  - a) ESMA will consult MAFF and METI with a view to reaching a common recognition on the intended timeframe for, and the purpose and scope of, any On-site Visit. MAFF and METI may, in their discretion, accompany or assist the visiting ESMA officials during the On-site Visit;
  - b) When establishing the scope of any proposed On-site Visit by ESMA officials, ESMA will consider the supervisory activities of MAFF and METI given ESMA's reliance on the supervision and enforcement capabilities of MAFF and METI in respect of Covered CCPs and will consider any information that was made available or is capable of being made available by MAFF and METI; and
  - c) MAFF and METI will assist ESMA in reviewing, interpreting and analysing the contents of public and non-public Books and Records and obtaining information from directors and senior management of a Covered CCP.



## **Item 6**

### **Permissible uses of information**

1. The Requesting Authority may use non-public information obtained under this MoC solely for the purpose of ensuring, monitoring or assessing compliance with the relevant Laws and Regulations applicable to the Requesting Authority.
2. Before using non-public information furnished under this MoC for any purpose other than that stated in Item 6(1), the Requesting Authority must obtain written consent of the Requested Authority for the intended use. If consent is denied by the Requested Authority, the Authorities will consult to discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
3. Information received will not be used for criminal proceedings carried by a court or a judge. In the case that such use is needed, an additional request must be made following procedures for the Requested Authority's provision of mutual legal assistance in criminal matters to foreign countries, which are set out in the Law for International Assistance in Investigation and Other Related Matters of Japan (Act No. 69 of 1980) and the relevant European legislation or relevant international arrangements.
4. If an Authority ("Receiving Authority") receives, via a third party that is not a participant to this MoC, non-public information originally provided by the other Authority ("Disclosing Authority") that is related to the Disclosing Authority's supervision and oversight of a Covered CCP and that the Receiving Authority is aware was obtained by the third party from the Disclosing Authority on a confidential basis, the Receiving Authority will use and treat the information following the terms of this MoC.
5. The restrictions in this Item do not apply to an Authority's use of information it obtains directly from a Covered CCP.

## **Item 7**

### **Confidentiality and onward sharing of information**

1. Except as stated in Item 7(2) or (3), or pursuant to a legally enforceable demand, each Authority will keep confidential, to the extent permitted by law, non-public information shared under this MoC, requests made under this MoC, the contents of such requests, and any other matters arising under this MoC. The terms of this MoC are not confidential.
2. As required by law, it may become necessary for a Requesting Authority to share non-public information obtained under this MoC with a Governmental Entity in its jurisdiction. In such circumstances and to the extent permitted by law:
  - a) The Requesting Authority will notify the Requested Authority; and

- b) Prior to the Requesting Authority sharing the non-public information, the Requesting Authority will provide adequate assurances to the Requested Authority concerning the Governmental Entity's use and confidential treatment of the information, including, as necessary, assurances that:
  - i. The Governmental Entity has confirmed that it requires the information for the purpose of enabling it to fulfil its responsibilities and mandates as described in Item 1; and
  - ii. The information will not be shared by the Governmental Entity with third parties without obtaining prior written consent of the Requested Authority.
- 3. Except as stated in Item 7(2) and without prejudice to Item 6(3) if disclosure is needed, the Requesting Authority must obtain prior consent of the Requested Authority before disclosing non-public information received under this MoC to any non-participant to this MoC. The Requested Authority will take into account the level of urgency of the request and respond in a timely manner. During an Emergency Situation, consent may be obtained in any form, including orally, provided that such communication is confirmed in writing as promptly as possible following such notification. If consent is denied by the Requested Authority, the Requesting and Requested Authorities will consult to discuss the reasons for withholding approval of such disclosure and the circumstances, if any, under which the intended disclosure by the Requesting Authority might be allowed.
- 4. To the extent legally permissible, the Requesting Authority should notify the Requested Authority of any legally enforceable demand for non-public information that has been furnished under this MoC. Prior to complying with the demand, the Requesting Authority will assert all appropriate legal exemptions or privileges with respect to such information as may be available.
- 5. The Authorities intend that the sharing or disclosure of non-public information, including deliberative and consultative materials, pursuant to the terms of this MoC, will not constitute a waiver of privilege or confidentiality of such information.
- 6. The Authorities acknowledge that nothing in this Item 7 prevents an Authority from disclosing information it receives directly from a Covered CCP.

## **Item 8**

### **Successor authorities**

- 1. Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of the MoC should apply to the successor authority or authorities performing those relevant functions, such successor authority or authorities should become a participant or participants to this MoC without the need for any further modification to this MoC, and notice will be provided to the other Authority. This will not

affect the right of any Authority to give written notice as stated in Item 11(2) that it no longer wishes to be a participant to this MoC if it wishes to do so.

#### **Item 9**

##### **Modifications**

1. The Authorities intend to periodically review the functioning and effectiveness of cooperation arrangements between the Authorities. This MoC may be modified with the written consent of all the Authorities.

#### **Item 10**

##### **Execution of the MoC**

1. Cooperation under this MoC will commence on the date that it is signed by the Authorities.

#### **Item 11**

##### **Termination**



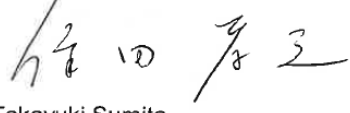
1. This MoC will remain operative for an unlimited period of time.
2. If an Authority wishes to no longer be a participant to this MoC, it should provide thirty (30) calendar days prior written notice to the other Authority.
3. If an Authority gives such notice, the Authorities will consult concerning the disposition of any pending requests. If a consensus cannot be reached through consultation, cooperation will continue with respect to all requests for assistance that were made under the MoC before the expiration of the 30-day period until all requests are fulfilled or the Requesting Authority withdraws such request(s) for assistance.
4. In the event of termination of this MoC, information obtained under this MoC will continue to be treated in the manner described under Items 6 and 7.
5. If this MoC is terminated without being substituted in a reasonable timeframe by an equivalent arrangement, pursuant to Article 25 of EMIR, ESMA will consider the withdrawal of recognition of the Covered CCPs.

**Signatures**

Date: 28/2/17

Date: 8/3/17

Date: 8/3/2017

European Securities and Markets Authority	Ministry of Agriculture, Forestry and Fisheries	Ministry of Economy, Trade and Industry
 Steven Maijoor Chairman	 Koji Inoue Director-General for Food Industry Affairs Bureau	 Takayuki Sumita Director-General for Commerce, Distribution and Industrial Safety Policy